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In The Supreme Court of the United States

October Term, 1951

No. 642

P. J. LYNCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

October Term, 1951

No.....

P. J. LYNCH,

Petitioner and
Appellant below,

vs.

UNITED STATES OF AMERICA,

Respondent and
Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To The Honorable Supreme Court of the United States:
Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This case is one of the seven companion cases brought by seven individual transferees of the Washington Fruit & Produce Company, a corporation, for the recovery of

excess profits taxes and declared value excess profits taxes assessed against and collected from these individuals as transferees of the corporation. It was stipulated by counsel that in all prior proceedings a determination of the instant case would be decisive in the other six actions (R 26-28; 144), and such stipulation has been extended to cover this petition and any subsequent proceedings.

On February 28, 1944, the Washington Fruit & Produce Company was a Washington corporation engaged in growing, storing, preparing and marketing fresh fruits at Yakima, Washington (R 37, 43, 53). On that date, the trustees of the corporation declared a dividend to the stockholders of 21,977 boxes of field-run apples owned by the corporation and stored within its warehouse (R 28-31). Petitioner was the owner of 25 per cent of the capital stock of the corporation, and as such was entitled to 5494 boxes. On the same day, the stockholders agreed to pool their apples and entered into an agreement with the corporation to wash, sort, pack, store and market the apples, and thereafter account to them for the net proceeds (R 32-35). The corporation fulfilled this agreement and disbursed the proceeds to the stockholders (R 33, 37). The agreement with the corporation was similar to other agreements which the corporation had with third persons (R 43, 74).

Petitioner reported the fair value of the apples received as a dividend in kind, as dividend income, and also

reported as income the profit received on the sale of the apples.

On April 29, 1944, the corporation was dissolved and the former stockholders continued the business, without interruption, as partners. Subsequently, petitioner, as one of the corporate transferees, was assessed his proportionate share of excess profits tax and declared value excess profits tax claimed to be due respondent from the corporation for the tax period ending on the date of dissolution (R 4-8). The tax claimed to be due from the corporation (and its transferees) was by virtue of the inclusion, as corporate income, of the excess value received by the stockholders in the later sale of the apples over the basis of those apples to the corporation (R 4-8). The increase resulted from a ruling by the Commissioner of Internal Revenue that the dividend in kind was not a true dividend, and that the income from the sale of the apples was in reality the income of the corporation, not the stockholders (R 4-8).

In addition, the corporate income was increased for the same year by another ruling. During 1944, and for prior years, the corporation also engaged in storing certain commodities under contract with the Federal Surplus Commodities Corporation (R 37-38). The provisions of the contract required full compliance with all contractual conditions and submission of a correct claim as a contingency of payment. The contract required the safekeeping and delivery of the commodities stored. Normal procedure

and custom for all storage was to await shipment from the warehouse before making any charge therefor (R 40-41). Corporate accounting of storage accounts was under a completed contract method.

Upon dissolution on April 29, 1944, the corporation, through its transferees, was required to include as income the value of the storage accounts on that date (R 4-8). This determination was made upon the theory that the corporation had the right to payment as of that date and for that reason the accounts should be accrued.

The applicable statutes of the Internal Revenue Code are Sections 22 (a), defining "gross income," and 115 (a), defining "dividend" (26 U. S. C. Sections 22 (a), 115 (a)).

As a transferee of the corporation, petitioner paid his proportionate share of the excess profits tax and declared value excess profits tax assessed by reason of the rulings referred to above. Following rejection of his claim for refund (R 6-8), petitioner brought this action for the recovery of such assessments in the amount of $10,000.00. Trial was had before the United States District Court for the Eastern District of Washington, Southern Division, following which the court rendered judgment in favor of petitioner upon the dividend in kind issue in the amount of $2,152.75, and against petitioner upon the storage accrual issue (R 18-19).

Thereafter, respondent herein appealed to the United

States Circuit Court of Appeals for the Ninth Circuit from that portion of the judgment in favor of petitioner herein; and petitioner cross-appealed from that portion of the judgment denying petitioner recovery upon the storage accrual issue (R 19, 22).

On November 23, 1951, the Circuit Court of Appeals entered judgment reversing that portion of the judgment in favor of petitioner upon the dividend in kind issue, and affirming that portion of the judgment denying petitioner recovery on the storage accrual issue (R 162-163). Upon the dividend issue, the Circuit Court reversed the finding of fact made by the District Court, and ruled that the dividend in kind was not a true dividend (R 156-158). Upon the storage accrual issue, the Circuit Court upheld the District Court's ruling that the true method of reflecting corporate income required the accruing of storage accounts as of the date of corporate dissolution (R 159-162).

A petition for rehearing, timely filed by petitioner, was denied by the Circuit Court by order entered December 27, 1951 (R 163).

JURISDICTIONAL STATEMENT

It is contended that this Court has jurisdiction to review the judgment here in question under 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Did the dividend in kind of apples constitute a true dividend, taxable as income to the petitioner-stockholder, upon the subsequent sale of which, after improvement, the gain therefrom would be the income of petitioner-stockholder?

2. Where the assets of the dissolved corporation are transferred to all former stockholders who continue the business, without interruption, as partners, is the dissolution sufficient grounds for requiring a change of corporate accounting to include storage accounts as corporate income, as of the date of dissolution, when there is no right to payment for such storage as of that date?

3. Where the trial court, following trial without jury, makes and enters a finding of fact based upon substantial evidence, may a Circuit Court of Appeals reverse that finding as erroneous?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Circuit Court of Appeals is inconsistent with decisions of other Circuit Courts upon the same matter and is in conflict with applicable decisions of this Court in holding that the normal tax consequences of a legitimate business transaction and the transaction itself are avoided because the motive thereof is the reduction of income taxes.

2. The decision is inconsistent with applicable decisions of other Circuit Courts and this Court in requiring, on corporate dissolution, the accrual, as income, of storage accounts, when all conditions precedent to the right to payment for such storage had not been performed as of the date of dissolution.

3. The decision is in conflict with applicable decisions of this Court, is a departure from the usual course of judicial proceedings, and requires the supervision of this Court because it avoids the rule that a finding of fact by the trial court is not clearly erroneous where it is based upon substantial evidence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated March 1, 1952.

P. J. LYNCH
by C. W. Halverson
Counsel for Petitioner

E. F. VELIKANJE
JOHN S. MOORE, JR.
of Counsel

Supreme Court of the United States

October Term, 1951

No.....

P. J. LYNCH,

Petitioner and Appellant below

vs.

UNITED STATES OF AMERICA,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

Judgment of the trial court was entered in the United States District Court for the Eastern District of Washington, Southern Division, on October 30, 1950 (R 18-19). The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R 154-162) is reported in 192 F 2d 718.

JURISDICTION

1. The date of the judgment to be reviewed is November 23, 1951. A petition for rehearing was denied on December 27, 1951 (R 163).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 United States Code, Section 1254 (1).

3. The determination of the Circuit Court should be reviewed by this Court because it is in conflict with the decisions of other Circuit Courts of Appeal upon the same matter and with applicable decisions of this Court as to the points hereinafter set forth by Argument. In addition that determination so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision as hereinafter set forth by argument.

STATEMENT OF THE CASE

A statement of the case has already been made in the preceding petition for writ of certiorari und[illegible] 1 (pp. 3-7), which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the dividend in kind declared by the trustees of the Washington Fruit & Produce Company, a corporation, was not a true dividend.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that storage accounts for which the corporation was not then entitled to payment should be included as corporate income as of the date of corporate dissolution.

3. The Circuit Court of Appeals for the Ninth Circuit erred in reversing the finding of fact by the District Court "that the dividend in kind was a true dividend," which finding was not clearly erroneous and was supported by substantial evidence.

ARGUMENT

Summary of Argument

Point A. The Circuit Court of Appeals for the Ninth Circuit denied the validity of the dividend in kind as a true dividend for the reason that the motive for the declaration thereof was the reduction of income taxes. This ruling is in conflict with applicable decisions of this Court and other Circuit Courts of Appeal.

Point B. The Circuit Court of Appeals for the Ninth Circuit required a change of accounting method upon corporate dissolution in order to establish as corporate income storage accounts for which the corporation was not then entitled to receive payment. This ruling is in conflict with applicable decisions of this Court and other Circuit Courts.

Point C. The Circuit Court of Appeals for the Ninth Circuit reversed a finding of fact made and entered by the trial court, which finding was supported by substantial evidence. This ruling is in conflict with applicable decisions of this Court and is such a departure from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Point A

The declaration of the dividend in kind was deemed by the Circuit Court not a true dividend because the motive of tax reduction avoided its substance and validity.

A dividend is a distribution to shareholders of corporate earnings and profits *(Commissioner of Internal Revenue v. Bedford's Estate,* 65 S Ct 1157, 325 U S 283, 89 L ed 1611), while a dividend in kind is a distribution to shareholders in any medium other than money *(Commissioner of Internal Revenue v. First State Bank of Stratford,* 168 F 2d 1004, 5th Cir.).

The motive of a taxpayer to reduce or escape the payment of a tax does not affect the validity of the transaction by which the taxpayer seeks to achieve that result *(Gregory v. Helvering,* 293 U S 465, 79 L ed 596, 55 S Ct 266).

If the method employed by the taxpayer to reduce or escape the payment of a tax is in reality that which it appears to be, the fact that taxes are reduced or avoided, and that such was contemplated, is immaterial *(Gregory v. Helvering,* supra; *U. S. v. Cumberland P. S. Company,* 338 U S 451, 94 L Ed 251; 70 S Ct 280; *Chisholm v. Commissioner of Internal Revenue,* 2d Cir., 79 F 2d 14; *United States v. Cummins Distilleries Corporation,* 6th Cir., 166 F 2d 17).

The Circuit Court in making the determination denying the validity of the dividend because motivated by a desire to reduce taxation, quoted and cited *Commissioner v.*

Transport Trading & Terminal Corp., 176 F 2d 570, 572, 2d Cir. (R. 157). That decision and the decision of the Circuit Court in the instant case have established a real conflict with the decisions of other Circuit Courts and this Court as above set forth.

Point B

The corporation maintained an accounting method similar to completed contract upon storage accounts, making a charge therefor and receiving payment upon shipment and delivery of the stored commodities. Although by custom and contract, the corporation had no right to payment as of the dissolution date, storage accounts existing as of that date were required to be taken as corporate income.

A method of accounting shall fairly and honestly reflect the income of the taxpayer. *Kentucky Color & Chemical Co. v. Glenn*, 87 F Supp. 618, D. C. Ky.; *Osterloh v. Lucas*, 37 F 2d 277, 9th Cir.; *Huntington Securities Corporation v. Busey*, 6th Cir., 112 F 2d 368.

A completed contract method of accounting is a type of accrual basis, contingent upon certain conditions.

Actual receipt determines income under the cash basis; a fixed or unconditional right to receive payment determines accrual income. *Franklin County Distilling Company v. Commissioner of Internal Revenue*, 6th Cir., 125 F 2d 800; *H. Liebes & Co. v. Commissioner of Internal Revenue*, 9th Cir., 90 F 2d 932.

Accrual as income is required only when the events occur to fix the amount due and determine the liability to pay. *Commissioner of Internal Revenue v. Edwards Drilling Co.*, 5th Cir., 95 F 2d 719.

The decision of the Circuit Court is in conflict with the decisions of other Circuit Courts in determining as corporate income that for which there was no realized gain nor fixed right to receive payment on the date of dissolution.

Point C

The determination of the dividend in kind issue was based solely on the question of whether or not the dividend in kind was a true dividend. The trial court made a finding that it was a true dividend, based upon substantial evidence. The Circuit Court reversed that finding as erroneous.

Rule 52(A) of the Federal Rules of Civil Procedure requires that findings of fact shall not be set aside unless clearly erroneous.

Findings by the trial court are binding on appeal if the records offer an adequate basis for the conclusions and inferences drawn by the trial court *(U. S. v. Cold Metal Process Company*, 164 F 2d 754, 6th Cir.).

The appellate court's determination should be limited to whether the inferences and conclusions of the trial judge in making findings of fact have any substantial basis in the evidence, and if such basis is present, the findings of the trial court must be accepted. *Gaytime Frock Company v.*

Liberty Mutual Insurance Company, 148 F 2d 694, 7th Cir.

Even though different reasonable inferences may fairly be drawn from the evidence, the appellate court should not disturb the findings of the District Court unless they are clearly erroneous. *Tennessee Coal, Iron & R. Company v. Muscoda Local No. 123*, 137 F 2d 176, 5th Cir.; *Bostian v. Levich*, 134 F 2d 284, 8th Cir.

The findings of the District Court which are supported by evidence or which are based upon reasonable inferences drawn from evidence, are not clearly erroneous. *Cray, McFawn & Co. v. Hegarty, Conroy & Co.*, 109 F 2d 443, 2d Cir.; *Reynolds Metal Co. v. Skinner*, 166 F 2d 66, 6th Cir. See also, *Commissioner of Internal Revenue v. Court Holding Company*, 324 U S 331, 89 L ed 981, 65 S Ct 707; *Dobson v. Commissioner of Internal Revenue*, 320 U S 489, 88 L ed 248, 64 S Ct 239; *Commissioner of Internal Revenue v. Scottish American Invest. Co.*, 323 U S 119, 89 L ed 113, 65 S Ct 169.

The action of the Circuit Court in reversing the findings of fact is in direct conflict with applicable decisions above set forth, and calls for the exercise of this Court's power of supervision.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter re-

viewing and reversing said decision of the Circuit Court of Appeals for the Ninth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 642

P. J. LYNCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 154–162) is reported at 192 F. 2d 718. The views of the District Court are included in a letter dated July 26, 1950 (R. 16–17), and in formal findings of fact and conclusions of law (R. 11–15).

JURISDICTION

The judgment of the Court of Appeals (R. 162–163) was entered November 23, 1951. A petition for rehearing, filed by the taxpayer on December 21, 1951, was denied December 27, 1951. (R. 163.) The petition for a writ of certiorari was

filed on March 10, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the profits from the sale of a specified quantity of apples, which a corporation had transferred to its stockholders as a purported dividend in kind, were taxable to the corporation.

2. Whether storage fees which had been earned by the same corporation prior to its liquidation, but which had not been paid to it, were properly included in its taxable income.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts, as they relate to the two questions raised by the petition for a writ of certiorari, may be summarized as follows:

1. The Washington Fruit & Produce Company, a corporation (hereinafter referred to as the corporation), was engaged in growing, warehousing and marketing fresh fruits and vegetables. (R. 12.) The taxpayer and three other persons were the stockholders of that corporation. (R. 74.) After the liquidation of the corporation, its stockholders were assessed, as transferees, for certain deficiencies in its taxes.

On February 28, 1944, the corporation declared a dividend in kind of a lot of 21,977 boxes of

apples. (R. 12, 29, 47, 91.) At the same meeting the stockholders entered into a contract (R. 33; Ex. 2) with the corporation to dispose of the lot of apples for the stockholders and account to them for the net proceeds (R. 37, 57, 95), after deducting washing, packing and storage costs (R. 53). None of the apples were ever delivered to any of the stockholders and there was no intention to do so. (R. 56.) At that time the corporation had sufficient orders on hand so that the sale of the apples was accomplished merely by accepting orders. (R. 51, 81, 98.) The dividend was declared for the sole purpose of obtaining a tax advantage to the stockholders (R. 97, 101) and to the corporation (R. 102, 139, 141). The sale of the apples under the contract was begun on March 4, 1944, and they were all marketed by the end of April, 1944. (R. 64–65.) The corporation's bookkeeper rendered a statement of receipts and charges made against the stockholders as a settlement sheet of the transaction (R. 35; Ex. 3), and the stockholders were paid the net proceeds (R. 37, 98). The corporation was liquidated on April 29, 1944. (R. 12.)

The Commissioner of Internal Revenue determined that the sale of the apples by the corporation was a sale on its own account and that the excess of the sales price over the cost to the corporation was income to it. (R. 12, 13, 16.) Finding that the dividend was a true dividend in kind and that the proceeds of the sale were

not taxable as income to the corporation, the District Court ruled against the Commissioner's determination and in favor of the taxpayer. (R. 13, 16–17.) The Court of Appeals, on the other hand, held that this finding of the District Court was clearly erroneous and accordingly reversed the latter's judgment on this point. (R. 156, 162–163.)

2. In addition to its activities mentioned above, the corporation also engaged in the business of storing fruit, meat and other products. (R. 38.) Its charges for storage were normally billed against customers at the time the stored goods were removed from its warehouse. (R. 40, 93.) The corporation generally accrued expenses incident to its business (R. 61, 65, 121, 133) but did not include in income its charges for storages until they were paid. (R. 59, 65–66.) That practice usually correctly reflected the corporation's income for its fiscal year because ordinarily most of the stored goods were removed from its warehouse and sold by or before the end of its year in the normal operation of the corporation's business. (R. 46, 88–89, 115, 116.)

The corporation was voluntarily liquidated on April 29, 1944. (R. 12, 38.) At that time it had a contract with the Federal Government for the storage of various products (R. 41, 93), which specified a monthly storage charge (R. 17, 94, 118). At April 29, 1944, the storage charges earned upon the government products then in

the corporation's warehouse amounted to $37,225.96. (R. 117.) No part of this amount was included in the corporation's income tax return for the period ended April 29, 1944, upon its liquidation. (R. 117, 121.) The products stored for the Government ordinarily would remain in the corporation's warehouse from one to six months, awaiting ships for loading and transhipment (R. 58, 129), and those in storage at April 29, 1944, were only such products as had not been removed because of the lack of means of transshipment (R. 58).

The Commissioner of Internal Revenue determined that the earned charges of $37,225.96 for government storage were includible in the corporation's income for the period ended April 29, 1944 (R. 13), and the District Court (R. 18–19) and the Court of Appeals (R. 162–163) sustained that action.

ARGUMENT

The decision of the Court of Appeals reversing the District Court upon the first question raised in the petition for a writ of certiorari and affirming its decision upon the second question (R. 162–163) is correct.

1. The District Court clearly erred in finding that the profits from the sale of the apples was not income to the corporation. The crux of the matter was, as the Court of Appeals concluded (R. 156), that the dividend declared on February 28, 1944, was that of a going concern out of

its stock in trade. As that court pointed out, it is clear that the shareholders caused the dividend to be declared with the knowledge and expectation that the property distributed would be sold immediately by the corporation in the normal course of its business, in essentially the same manner, and it is fair to assume to the same persons to whom it would have been sold had there been no dividend declared. (R. 156–157.) In the circumstances there was, as the Court of Appeals said (R. 157), no motive for the dividend other than to escape taxation. That conclusion is borne out by the record which manifests that the dividend was declared for the purpose of obtaining a tax advantage to the stockholders (R. 97, 101) and to the corporation (R. 102, 139, 141). In fact the District Court found that the primary motive for the declaration of the dividend was to reduce the income tax liability of the corporation (R. 17).

In that light the Court of Appeals correctly decided that the dividend was not the kind of distribution contemplated by Section 115 (a) of the Internal Revenue Code (Appendix, *infra*, p. 12). The corporate tax is aimed primarily at the profits of a going concern (*United States* v. *Cumberland Pub. Ser. Co.*, 338 U. S. 451, 454–455) and where a commercial or industrial transaction described in the taxing statutes is not one entered into for commercial or industrial purposes but is made for no other purpose than to escape

taxation, it must be ignored for tax purposes (*Commissioner* v. *Transport Trad. & Term. Corp.*, 176 F. 2d 570, 572 (C. A. 2), certiorari denied, 338 U. S. 955). See also *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Wichita Term. El. Co.* v. *Commissioner*, 162 F. 2d 513, 515 (C. A. 10); *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321 (C. A. 2), certiorari denied, 329 U. S. 774; *Hellebush* v. *Commissioner*, 65 F. 2d 902 (C. A. 6); and *Commissioner* v. *First State Bank*, 168 F. 2d 1004 (C. A. 5), certiorari denied, 335 U. S. 867.

The petitioner asserts that the decision of the court below is in conflict with the holding of this Court in *Gregory* v. *Helvering*, 293 U. S. 465. (Brief in Support of Petition for Certiorari, pp. 14–15.) It was stated in that case that an ulterior purpose to avoid taxation does not nullify a corporate act for tax purposes. But the Court did not hold that when the only effect of the act is to avoid taxation and when the procedure followed had no other purpose or result, it must be taken at face value. In fact, in that case a purported corporate reorganization was disregarded because it was a mere artifice (293 U. S. 465, 470). The conclusion of the court below that the purported dividend did not result in divesting the corporation of the income resulting from the sale of the apples is entirely consistent with, and is supported by, that holding.

Nor does the decision of the Court of Appeals do violence to Rule 52 (a) of the Federal Rules

of Civil Procedure which provides that findings of fact shall not be set aside unless clearly erroneous. Here there was no conflict in the evidence as to the basic facts. Both courts recognized that the motive of the purported dividend was to avoid taxation. The only question was whether or not the court was bound to accept the artifice as real, and the court below properly held that it was not so bound.

The decision of the Court of Appeals in this case is not in conflict with any other decision and raises no important question not previously resolved. There is thus no occasion to grant the writ with respect to the first question which the petition raises.

2. The applicable statutory provisions, Sections 41 and 42, Internal Revenue Code, and the related provisions of Treasury Regulations 111 (Appendix, *infra,* pp. 11–14) were correctly applied by the District Court and the Court of Appeals in deciding the second question raised in the petition in this case. The Commissioner of Internal Revenue has broad discretion to require that income be reported by a method which clearly reflects that income (Section 41, Internal Revenue Code, Appendix, *infra,* p. 11, and *Brown* v. *Helvering,* 291 U. S. 193, 203). Even the fact that the Commissioner has, in prior years, accepted returns upon a basis other than that required for the taxable period involved does not preclude him from insisting upon a method which will clearly reflect

income for the period being audited (*Carver* v. *Commissioner,* 173 F. 2d 29 (C. A. 6th) and *William Hardy, Inc.* v. *Commissioner,* 82 F. 2d 249, 250 (C. A. 2d).

Here, in prior years, returns prepared upon the accrual basis in part had been accepted even though they included storage charges only when paid, because the payments had usually taken place before the close of the Corporation's fiscal year. The inconsistency was therefore not material. It is obvious that that method failed to reflect income clearly in the year of the corporation's liquidation which took place on April 29, 1944. By placing in gross income for the taxable period ending upon that date, the storage charges of $37,225.96, which had accrued during that period, the Commissioner, far from repudiating the method used in prior years, merely applied the accrual method to all items of income and expense up to the date of dissolution. Under those circumstances his action was correct. See *Franklin County Distilling Co.* v. *Commissioner,* 125 F. 2d 800 (C. A. 6th), and *Jud Plumbing & Heating* v. *Commissioner,* 153 F. 2d 681 (C. A. 5th).

Under well established rules it is the *right* to receive income and not the actual receipt which determines inclusions in gross income upon the accrual basis (*Spring City Co.* v. *Commissioner,* 292 U. S. 182, 184–185). Here, as the Court of Appeals pointed out (R. 160–161), the corporation

prior to the liquidation had faithfully performed the services which created its right to the storage charges in question and the amount thereof was readily ascertainable at that time. In this light alone the decision of the District Court and that of the Court of Appeals in this case were manifestly correct.

There is no conflict of the decision here with other decisions. In so asserting (Br. 15, 16) the taxpayer begs the question by a mere recitation of postulates. Nothing in the decision he seeks to have this Court review offends these general propositions of law.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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APRIL 1952.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but * * * if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U. S. C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for

the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U. S. C. 1946 ed., Sec. 42.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, (or (2) out of the earnings or profits of the taxable year * * *.

* * * * *

(26 U. S. C. 1946 ed., Sec. 115.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.41–1. *Computation of Net Income.*—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of

which items of gross income and deductions are to be accounted for. (See sections 29.42–1 to 29.42–3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

SEC. 29.41–2. *Bases of Computation and Changes in Accounting Methods.*—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. * * * All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. * * *

* * * * *

SEC. 29.41–3. *Methods of Accounting.*—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * *

* * * * *

SEC. 29.41–4. *Accounting Period.*—The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not established a fiscal year. (See section 48.) The term "fiscal year" means an accounting period

of 12 months ending on the last day of any month other than December. * * *

SEC. 29.42–1. *When Included in Gross Income.*—(*a*) *In general.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *

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